Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., RESPONDENTS

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL., RESPONDENTS

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS

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Respondents, in a supplemental submission, "bring[] to this Court's attention" Executive Order 12,818 (October 23, 1992) and offer an excerpt from the "Fact Sheet" issued by the White House Office of the Press Secretary

that accompanied the Executive Order to "contradict" Petitioners' and the Solicitor General's contention that "union only project agreements 'further substantial public purposes.'" Resp. Supp. Br., 1-2.

There is no contradiction between the Executive Order or the press statement and our prior submissions; there is, however, a contradiction between the Executive Order and Respondents' legal position in this case; aside from this the Executive Order has no direct relevance for present purposes.

1. Petitioners have never asserted, and do not assert now, that project agreements *always* produce economic benefits to construction industry employers and to property owner-developers. We have argued only that under certain circumstances project agreements may reasonably be thought to produce such benefits and that the national labor laws clearly leave open the option to contractors and owners to reach, and to act on, that proposition. We have cited ample evidence, some of it from federal sources, that such economic benefits exist. *See* BCTC Pet. 9-12; Pet. Br. 13-14, 31-32 & n.15; Pet. Reply Br. 6-7 & nn. 4 & 5. *See also* U.S. Br. on Pet. 13-14; U.S. Br. 24-29 & nn. 19-22.

The White House Press Secretary's "Fact Sheet," as quoted at Resp. Supp. Br. 2-3 does not contradict that evidence but simply ignores all the potential costs generated by prohibiting project agreements and all the potential benefits provided by permitting contractors and owners to negotiate such agreements. The sum and substance of the "Fact Sheet" quotation is that project agreements "effectively eliminate the competitive advantages" afforded by "open shop" contractors and thus increase construction costs.

Be that as it may, project agreements have often proved to be the only means for obtaining legal assurances against the economic losses associated with lawful

labor disputes, for assuring mutually-agreeable labor costs over the long term, and for guaranteeing continued access to that pool of skilled workers who desire to work under collectively-bargained conditions of employment. Nothing in the "Fact Sheet"—or the Executive Order—even examines these potential benefits much less demonstrates that in any particular case the net benefits to be expected from a project agreement will necessarily be outweighed by the net benefits to be expected from "open shop" operations.[1]

2. The Executive Order does, to be sure, contradict the legal position of both Respondents and the majority below. Respondents argue, and the lower court opined, that any interference by a state property owner-developer in the decision by its contractors whether to conclude a project agreement on a government project is invalid because preempted by the National Labor Relations Act. *See, e.g.*, Resp. Br. 10; MWRA Pet. App. 30a. By that argument, a state government would be prohibited from issuing an order analogous to Executive Order 12,818—*viz.*, an order barring from state projects all contractors who have negotiated binding collective bargaining agreements containing lawful union contracting and subcontracting clauses.[2]

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[1] While the Executive Order itself clearly recognizes that prohibiting project agreements may at times lead to increased labor strife, and increased overall labor costs, the Order also makes clear that it prohibits such agreements even where such added costs result. *See* Executive Order 12,818, § 4 (stating that increased costs due to increased labor strife may not excuse adherence to the Executive Order's prohibition).

[2] Petitioners' position, in contrast, is that a state agency's involvement in its contractors' project agreement decisions, *based on proprietary concerns*, is no more precluded by the Act than would be the involvement of a private owner-developer. As was found by the courts below in this case, the state agency's involvement in the instant case—which is addressed only to a particular project—is motivated solely by proprietary concerns and is not animated by regulatory purposes. *See* MWRA Pet. App. 74a-75a.

3. Whether and to what extent Petitioners' contentions, or those of Respondents, touch on the validity of E.O. 12,818 is an issue not presented in this case. By its terms, the Executive Order does not extend to any contracts let before the Order's effective date. The Authority has let more than $1 billion in contracts prior to that date. This case was brought to challenge the validity of those contracts. Moreover, there is no realistic prospect that the federal grants made, or to be made and applied against these contracts during the predictable life expectancy of the Executive Order, will exceed that sum.

Respectfully submitted,

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